

COMPARATIVE AND INTERNATIONAL ASPECTS OF AMERICAN GOLD CLAUSE ABROGATION

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THE Joint Resolution of Congress of June 5, 1933, abrogating the gold clause,¹ has provoked considerable and pertinent legal examination of the subject.² This examination has so far been restricted to a single problem: the constitutionality of the new law. But numerous other questions are involved, such as those relating to the different types of gold clauses, their interpretation, and their effect in the case of nonperformance or of invalidity; and more important still, there arises the problem of delimiting the operative scope of the Joint Resolution itself. The disregard of these and other inherent problems is understandable because at present the issue of constitutionality is the dominant one. The writer, however, will not presume to enter very deeply into the question of American con-

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1. The essential provisions of the Joint Resolution read as follows: "That (a) every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

"(b) As used in this resolution, the term 'obligation' means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term 'coin or currency' means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations. . . ." 48 STAT. 113 (1933), 31 U. S. C. A. 463 (1933).

2. Barry, *Gold* (1934) 20 VA. L. REV. 263; Collier, *Gold Contracts and Legislative Power* (1934) 2 GEO. WASH. L. REV. 303; Garriss, *The Gold Clause* (1933) 165 ANNALS 219; Hanna, *Currency Control and Private Property* (1933) 33 COL. L. REV. 617; *Federal Currency Restrictions and Gold Contracts* (1933) A. B. A. J. 349; Johnson, *Constitutional Limitations and the Gold Standard* (1933) 67 U. S. L. REV. 187, 239; King, *The Gold Clause: Can It Constitutionally Be Abrogated By Legislation?* (1934) 2 GEO. WASH. L. REV. 131; Nebolsine, *The Gold Clause in Private Contracts* (1933) 42 YALE L. J. 1051; Post and Willard, *The Power of Congress to Nullify Gold Clauses* (1933) 46 HARV. L. REV. 1225; Thorpe, *Contracts Payable in Gold*, SEN. DOC. NO. 43, 73d Cong., 1st Sess. (1933); see further the report in Gordon, *Force and Effect of Clauses Providing for Payment of Private Indebtedness in Gold* (1933) 31 MICH. L. REV. 953, and von Baumhauer, *De goudclausule in de Americaansche wetgeving, literatuur en Rechtspraak* (1933) NEDERLANDSCHE JURISTENBLAD No. 43.

stitutional interpretation; neither will any attempt be made in this article to include a general analysis of the gold clause.³ It is proposed, first, to contribute from the point of view of Comparative Law some thoughts and observations to the pending discussion; and, second, to inquire into the international repercussions of the American statute. These repercussions appear not yet to have been considered by American commentators although they constitute, in our opinion, a problem of great actual importance. The solution of this problem is to be found primarily in the doctrines of the Conflict of Laws and in the wording of the American statute, but the comparative method will, it is suggested, likewise prove helpful here. Resort to foreign analogy has, indeed, been legitimized in so far as monetary questions are concerned, by the Supreme Court of the United States in *Juilliard v. Greenman*,⁴ one of the legal tender cases. There the Court in laying down the fundamental principle of nominalism, that

"A contract to pay a certain sum in money . . . may always be satisfied by payment of that sum in any currency which is lawful money at the place and time at which payment is to be made,"⁵

expressly referred to the famous French writers, Pothier [Contract of Sale No. 416] and Pardessus [Droit Commercial No. 204-5]. Certainly a comparative approach has much to recommend it. Under modern economic organization, monetary problems and issues tend everywhere toward the same types, and even factual developments in different countries are very often similar. There is thus no reason why the experiences of a given country and the expedients invented there should not be utilized in another country confronted with an analogous situation.⁶

I

The Joint Resolution of June 5, 1933, is by no means unique. As we shall observe later on,⁷ most countries in which currency has undergone a large depreciation, have by way of legislation abolished or restricted

3. An attempt at such a scrutiny may be found in NUSSBAUM, *DAS GELD IN THEORIE UND PRAXIS DES DEUTSCHEN UND AUSLÄNDISCHEN RECHTS* (1925) 164 et seq.; and in NUSSBAUM *La Clause or dans les contrats internationaux* (lectures 1933), published in (1934) 43 *RECUEIL DES COURS PROFESSÉS À L'ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE*, 559. Some of the discussion and material contained in these lectures are utilized in the present article.

4. 110 U. S. 421, 449 (1884); see Thayer, *Legal Tender* (1887) 1 *HARV. L. REV.* 73, reprinted in *LEGAL ESSAYS* (1908) 60.

5. 110 U. S. 421, at 440.

6. This use of comparative law is, of course, not at all confined to the monetary field. On the contrary, much progress is to be expected from a large application of the comparative method. See e.g., Rotondi, *Dogmatic and Comparative Law* (1933) 8 *TULANE L. REV.* 83.

7. See notes 35-55, *infra*, and accompanying text.

the gold clause. These statutes, enacted under the pressure of emergency are, in general, provisory and very short, and leave unsettled many problems of fundamental importance. The law of June 5, 1933, however, is more detailed and specific in character and, comparatively speaking, more carefully drafted. Its text particularly differs from foreign statutes in that it explicitly embraces "any obligation which purports to give the obligee the right to require payment in gold or a particular kind of coin or currency, or *in an amount in money of the United States measured thereby.*" In this instance, Congress has evidently recognized the distinction between a "gold coin clause" ("clause-espèces-or," "Goldmünzklausel") and a gold value clause ("clause-valeur-or," "Goldwertklausel"), previously elaborated by continental theory and decisions.⁸ By the "gold coin clause," the debtor is bound to pay in gold coin; in the case of a "gold value clause" he has to pay in paper, or at his option, in any other currency an amount equal to the value of the gold coin fixed by the promise.⁹

Although express gold value clauses seldom appear today in American contracts,¹⁰ the fact that the Joint Resolution explicitly abrogates such clauses is of far-reaching importance; for the customary American gold coin clause, containing a promise "to pay \$1000 in gold coin of the United States of America of the standard of weight and fineness existing the [date follows]"¹¹ must as a rule be interpreted as including a gold

8. See NUSSBAUM, *op. cit.* *supra* note 3, at 164; Nussbaum, *supra* note 3, at 562; Gény, *La validité juridique de la clause 'payable en or,'* (1926) *REVUE TRIMESTRIELLE DE DROIT CIVIL* 552, 574; ASCARELLI, *LA MONETA* (1928) 160; USSING, *UGESKRIFT FOR RETSVAESEN* (Copenhagen 1933) 264.

9. There is in theory a possibility of a mere bullion contract, providing not for a conveyance of gold coins but of a quantity of gold, to be calculated on the basis of a sum fixed in gold currency. Such bullion contracts do not, however, occur in practice. Sometimes indeed, the expression "bullion contract" is used for gold coin clauses.

10. There are such clauses in older contracts: (1) *Lane v. Gluckauf*, 28 Cal. 289 (1865). ("Orville, August 4, 1863 . . . I promise to pay to . . . the sum of \$2843 in gold coin of the standard value of 1860 of the United States of America. . . . And if said principal . . . is not paid in gold coin as above stated, then . . . I promise to pay . . . in addition thereto and as damages such further amount and percentage as may be equal to the difference in value in the San Francisco market between such gold coin and paper evidence of indebtedness of the States or the United States, that are or may hereafter be made a legal tender in payment of debts by the laws of this state or the United States.") (2) *Brown v. Welch*, 26 Ind. 116 (1866) (" . . . in gold or if paid in paper, the amount thereof necessary to purchase the gold at the place of payment, Logansport, Ind.") (date not reported). (3) *Killough v. Alford*, 32 Tex. 458 (1870), "La Grange, Texas, March 8, 1867. Twelve months after date we promise to pay . . . the sum of \$750 . . . payable in gold coin or the equivalent thereof in United States legal tender notes."

11. The widespread variant, "of or equal to the present standard, etc." does not refer to the value in legal currency, but to the weight and fineness of the coins, providing for the possibility that the weight or fineness might be changed by law. Lord Romer of the English Court of Appeal felt the words "or equal to" to be "mere surplusage." *Feist v. Société Intercommunale Belge d'Electricité*, [1933] 1 Ch. 708.

value clause by implication, for the protection of the creditor in case the delivery of gold should be impossible or impracticable.

The German Reichsgericht, to be sure, has held that if a debtor promises to pay a certain amount in gold coins, no gold value clause is to be implied. Relying upon a strained interpretation of the German Civil Code, this court granted discharge to certain gold debtors merely on the ground that after the outbreak of the war, gold coins had gone out of circulation.¹² Similarly the Court of King's Bench and the Court of Appeal of England, in deciding *Feist v. Société Intercommunale Belge d'Electricité*,¹³ refused to recognize the existence of an implied gold value clause.¹⁴

But these decisions do not represent the majority view and are unsatisfactory. From a strict contractual point of view, the aim of the gold clause is to secure to the creditor in all events an amount of legal tender equal to the actual market value of the promised gold coins.¹⁵ Otherwise the gold clause would lose its effect in the very contingency in antici-

12. Judgments of January 22, 1922, 103 Entscheidungen des Reichsgerichts in Zivilsachen 384; of March 1, 1924, 107 id. 371; of May 24, 1924, 108 id. 176. The argument rests on par. 245 of the German Civil Code, providing: "If a debt has to be paid in a particular kind of coin which is, at the time of payment, no longer in circulation, the payment must be made as if the particular kind of coin was not provided." The construction of this rule, as made by the Reichsgericht, seems incorrect. See NUSSBAUM, *op. cit. supra* note 3, at 84 et seq.

13. [1933] 1 Ch. 684.

14. The same mistake was made in *Irving Trust v. Hazlewood*, 148 Misc. 456, 265 N. Y. Supp. 57 (Sup. Ct. 1933) and in some French and Belgian decisions. See Nussbaum, *supra* note 3, at 587, 593.

15. Post and Willard, *supra* note 2, at 1234, suggest five possible "reasonable" constructions of the customary American gold clause as mentioned before: (1) that it is a pure bullion contract; (2) that it is a single obligation to deliver gold coins containing the amount of gold as indicated by the agreement; (3) that it is an alternative obligation, with an option in the obligee to take gold coins or their value in paper dollars; (4) that it is an alternative obligation, with a corresponding option in the obligor; (5) that it is a single obligation to pay the nominal amount of the debt in any form the obligor chooses. The authors prefer the third construction. The creditor would thus be entitled to the nominal amount in paper currency even if the debtor, as happened in *Butler v. Horwitz*, 7 Wall. 258 (U. S. 1868), and *Dewing v. Sears*, 11 Wall. 379 (U. S. 1870), should insist, in case of adverse judgment, on making payment in coins. This is discordant with the above decisions of the Supreme Court, and unjustifiable in itself. Under the gold clause as described, the debtor has a right to make payment in gold. It may be remembered that under special conditions, as those existing in Sweden during the World War, the value of paper currency may even exceed that of gold. Cf. CASSEL, *DAS GELDWESEN NACH 1914* (1925) 63 et seq.; Nolde, "*La monnaie en droit international public*" (1929) 27 *RECHUEIL DES COURS PROFESSÉS À L'ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE* 386. We therefore prefer a sixth construction, as explained in the text. The obligation of the gold debtor should be considered to be a single one purporting primarily a conveyance of gold coins, but requiring, in case of the impossibility of that, conveyance of an equivalent amount of any legal tender.

pation of which it had been inserted; it would, in fact, be wholly inoperative.¹⁶

For this reason, the Supreme Courts of Denmark and Finland,¹⁷ the Greco-Bulgarian Mixed Arbitral Tribunal,¹⁸ the Permanent Court of International Justice,¹⁹ and the English House of Lords²⁰ (reversing the decisions of the two lower British courts in the *Feist* case) have all held that a gold value clause must be implied. Of particular importance is the decision of the House of Lords, for the phraseology of the gold clause involved in the *Feist* case is exactly the same as that of the customary American one. And although the finding that the parties had really intended to use a gold value clause was rested upon the particular circumstances of that case,²¹ the judgment is nevertheless of general significance for the reason that circumstances of this kind exist in practically every case where a gold clause is incorporated into a contract.²² Accord-

16. The District Court of Colorado, in *Kennedy v. Conrad*, 78 Cong. Rec., April 4, 1934, at 6107, points out that in case the conveyance of gold coins is legally impossible, the creditor would not be entitled to the equivalent in other legal tender. He "would not . . . buy the gold equivalent therewith. . . . If he had the gold equivalent, he would have to turn it to some Federal Reserve Bank and at par. His government could get the profit or increase, but the plaintiff could not." This is not the point. The plaintiff, in the case assumed, does not claim damages for nonperformance, but payment on the ground of an implied gold value clause, determined to operate even in the case of performance being impossible. However, the attempt made by the Colorado judge is new and shrewd. The French courts derive the invalidity of the gold value clause from the assumption that it impugnes the "cours forcé" of the banknotes as well as the gold coin clause does; see notes 123-125, *infra*, and text above them.

17. Supreme Court of Denmark, decision of January 21, 1933, in *ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT*, 960 ("the payments are to be made in gold"); and the Supreme Court of Finland, decision of January 18, 1933, *id.* at 467 (to pay "in Finnish goldmark of the weight and fineness as provided by the monetary law of December 21, 1925").

18. *Stavrides v. Grebenaroff*, 6 *Recueil des Décisions de Tribunaux Arbitraux Mixtes*, 317 [to pay "500 napoléons of 20 French gold francs, in coin"].

19. *Cour permanente de justice internationale*, July 12, 1929, (1929) *JOURN. DR. INT.*, 977.

20. [1934] A. C. 161.

21. The same attempt is made by the Danish court. See note 17, *supra*.

22. The House of Lords in the *Feist* case went so far as to hold the said clause to be a pure gold value clause, since at the time the contract was made no gold coins were in circulation. But there is no reason why the creditor, by virtue of the clause at issue, should not be entitled to a conveyance of gold coin, in case gold currency had been reestablished. And no argument against the existence of the gold clause can, contrary to the opinion of the court, be derived from the fact that a fractional amount of the interest due (55 shillings for half a year) could not be paid in gold. Otherwise a real gold coin clause would be practically impossible. Such a clause, reasonably interpreted, is not inconsistent with some minor remainders being paid in currency. The same argument as advanced by the House of Lords has been set forth by the Permanent Court in the Serbian and Brazilian case, *supra* note 19, and the Swiss Federal Court in the *Heraclea Company* case, judgment of February 11, 1931, (1931) *JOURN. DR. INT.* 510. In the latter case, however, the debt was payable in "*piastres-or*." This being a money of account ("*monnaie de compte*"), a pure gold value clause should have been held existent.

ingly, at least if one may judge by comparative law, the fact that the American Joint Resolution contains a phrase expressly abrogating gold value clauses is of great significance. Were it not for such express statutory abrogation, non-existent in England, courts adjudicating cases governed by American law might well be expected, by implying the existence of a gold value clause, to reach the same result as did the House of Lords in the *Feist* case.

If the Joint Resolution of June 5, 1933, is constitutionally sustained in its effort to render inoperative both gold coin and gold value clauses, it will constitute a virtual release of debts, a "*σεισάχθεια*" on the largest scale ever recorded. On the basis that American bonds containing the gold clause exceed 100 billion dollars, more than 40 billion in nominal amount (though not necessarily in purchasing power) have been vitiated.²³ This must be borne in mind, not only to understand the financial and historical importance of the Joint Resolution, but also to realize that the Act is not chiefly a technical monetary measure, as the title and preamble suggests, but in reality a release of debts, and an encroachment upon the law of contract. This fact raises constitutional difficulties. The preamble proclaims that it is "the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payments of debts." This conforms to the title indicating the aim of the Joint Resolution "to assure uniform value to the coins and currency" of the United States.²⁴ Thus the technical monetary aspect of the law is intimated. But in fact the Joint Resolution did not establish any "equal power" or "uniform value" of gold dollar and paper dollar, for gold dollar coins had ceased to be legal tender either from the date of March 6, 1933 (President's proclamation making it illegal to pay out, export, earmark or permit the withdrawal or transfer of gold) or at latest from the date of April 5, 1933 (President's order requiring the delivery of gold and gold coins to the Federal Reserve Banks).²⁵ The Joint Resolution did not alter this situation at all. It was of no assistance in eliminating divergencies in the value of existing kinds of circulating media, because at the time the Resolution was passed only one medium, namely paper dollars, was in circulation.

23. N. Y. Herald Tribune, April 23, 1933, § 2, at 8, col. 1, gives these approximate figures of gold obligations: 22 billion dollars, U. S. A. security bonds; 16 billion dollars, state and municipal bonds; 12 billion dollars, foreign dollar bonds. The remaining more than 50 billion dollars are corporation bonds and real estate mortgages. But this refers only to bonded gold obligations. The statistics were compiled, the writer understands, by the Institute of International Finance, New York. See also Hanna, *supra* note 2, at 633n.

24. Similar views had previously been set forth by Thorpe, *supra* note 2.

25. In this sense, *Irving Trust v. Hazlewood*, 148 Misc. 456, 265 N. Y. Supp. 57 (Sup. Ct. 1933).

Even if gold coin had kept its status as legal tender, no legal parity would have been reestablished by the Joint Resolution because parity *in law* would have followed in any event from the fact that the coins were legal tender.²⁶ And certainly the Joint Resolution does not establish any factual parity; for notwithstanding the Resolution, gold coins still have a greater economic value. Economic parity can only be established either by a deflationary monetary policy or by legal reduction of the number of grains of gold in the gold coin itself, as has since been done by the President's order of January 31, 1934.²⁷

Still less tenable is the argument in behalf of the Joint Resolution advanced by the United States District Court in *In re Missouri Pacific Rr. Co.*²⁸ This court, declaring that the subject matter of the gold clause was a mere commodity, placed the abrogation of the gold clause in the same category as the prohibition of the possession of opium. The difficulty with this view is that in the case of a gold clause, money and not a commodity, is owed by the debtor.²⁹ But even if the court were correct in believing gold coin to be a commodity, its argument would sustain the constitutionality of only the portion of the Joint Resolution relating to gold coin clauses, not the portion relating to gold value clauses.

However, constitutional justification for the Joint Resolution can be found in another line of argument. The strict enforcement of these billions of dollars' worth of gold clause obligations against hard pressed debtors would precipitate increased bankruptcies and increased liquidation of securities and loans. The result might be a collapse of the banking system and, in further consequence, a monetary crisis; and this would possibly affect the value of money. In measure as the Joint Resolution tends to prevent the development of such a crisis, it may be justified

26. This was the situation during and shortly after the Civil War. Then, greenbacks and coined dollars were simultaneous legal tender, and both of them were in circulation, although gold coins were at a varying agio. Nevertheless there was equivalence in law, *Bronson v. Rodes*, 7 Wall. 229, 251 (U. S. 1868). Dollar notes and coined dollars had legal parity, and it was for debtors only a matter of economic expediency not to pay in gold coins. Therefore *Bronson v. Rodes* is no longer applicable. *Irving Trust v. Hazlewood*, 148 Misc. 456, 265 N. Y. Supp. 57 (Sup. Ct. 1933). The same thing is true of the sovereign and the paper pound in England at the present time.

27. N. Y. Times, Feb. 1, 1934, at 1, col. 1 (Proclamation No. 2072).

28. 7 F. Supp. 1 (E. D. Mo. 1934).

29. *Thompson v. Butler*, 95 U. S. 694 (1877), interpreting *Bronson v. Rodes*, 7 Wall. 229 (U. S. 1868); *Howe v. Nickerson*, 96 Mass. (14 Allen) 400, 402 (1867) (excellent opinion delivered by Justice Gray); New York Court of Appeals in *Norman v. Baltimore & Ohio Rr. Co.*, N. Y. L. J., July 19, 1934, at 1, col. 1; House of Lords in the *Feist* case, *supra*, note 11; the same opinion in *NUSSBAUM*, op. cit. *supra* note 3, at 81. Under common law the main point is that if a money obligation is not performed, recovery of damages is limited to legal interests. *Wilson v. Morgan*, 27 N. Y. Super. Ct. (4 Rbt.) 58, 68 (1866); *American Chiclé Co. v. Somerville*, 50 Ont. L. R. 517, 525 (1921).

as an exercise of Congress's implied power to establish and protect a banking system,³⁰ and of its express power to regulate the value of money in the United States.³¹ But this, of course, does not mean that the statute is essentially a technical monetary one, for the value of the dollar may be influenced by measures of many different kinds, for example, by alterations of the law of contracts.

There still remains the constitutional problem of whether the Joint Resolution violates the due process clause of the Fifth Amendment. As bearing upon this problem it is appropriate to inquire into the reasonableness of statutory abrogation of gold clauses. After the country went off the gold standard, prices measured in terms of gold value rapidly declined,³² increasing considerably the purchasing power of the gold dollar. The maintenance of gold debts therefore would have involved economically an undeserved surplus for the creditor. He could not claim any particular merit in having stipulated for gold, for the clauses had become in American practice a matter of custom since the beginning of the Republic.³³ The debtor, in submitting to the gold clause, did not in general get a "consideration" or any compensation for taking over the whole monetary risk. Nevertheless, he could perhaps be expected to abide by the stipulation if his general economic condition had remained unchanged or had improved. But the contrary happened. A very great number of debtors were, because of the depression, no longer able to meet debts even at the nominal amount. Now it was felt to be morally and economically unsound to drive these honest debtors into bankruptcy by upholding gold clauses.³⁴ Such arguments might be insufficient for a court; therefore the legislature had to intervene.

The strength of these considerations is attested by the fact that so many other countries have, at one time or another, abrogated or restricted

30. Under the doctrine developed in *McCulloch v. Maryland*, 4 Wheat. 316 (U. S. 1819).

31. The Copenhagen Court in the case of the Copenhagen Telephone Co., not yet published, uses a still different argument to justify the Resolution as a regulation of the value of money. It points out that maintenance of the gold value clauses would cause a diminution of the gold cover of American currency, meaning probably that the maintenance of the clauses could provoke a strong demand for currency possibly affecting the proportion between gold reserves and notes in circulation. But there is in the Congressional data neither a statement nor even a suggestion to the effect that such an argument was considered by Congress. Indeed, payments for bonds and mortgages are generally not made in cash.

32. See index of wholesale commodity prices on a gold basis, currently published in *TIRE ANNALIST WEEKLY*, e.g. Dec. 29, 1933, at 838.

33. See Hanna, *supra* note 2, at 617, n. 20.

34. This viewpoint is expressed by the Federal District Court in *In re Missouri Pacific Rr. Co.*, 7 F. Supp. 1, 4 (E. D. Mo. 1934).

gold clauses: Belgium,³⁵ Egypt,³⁶ Germany,³⁷ Italy,³⁸ Roumania,³⁹ Greece,⁴⁰ Yugoslavia,⁴¹ Bulgaria,⁴² Mexico,⁴³ Costa Rica,⁴⁴ Sweden,⁴⁵ Esthonia,⁴⁶ Austria,⁴⁷ Columbia,⁴⁸ Guatemala,⁴⁹ and Cuba.⁵⁰

In France no such statute was originally enacted, but the French courts held void any gold clause except one involving a so-called "international payment" ("règlement international"), and this ruling was made statutory by the stabilization law of June 25, 1928.⁵¹ The exception made for international payments operates, however, preponderantly against foreign debtors, since as a matter of fact it is mostly foreign debtors who have undertaken gold obligations on behalf of French creditors; French debtors obligated to make gold payments under international contracts are not frequently to be found.⁵² Besides this, the notion of "interna-

35. Aug. 2, 1914. See NUSSBAUM, VERTRAGLICHER SCHUTZ GEGEN SCHWANKUNGEN DES GELDWERTES (1928) 80. The ordinance of August 2, 1914 was upheld by a decree of October 25, 1926, 1926 BULLETIN USUEL DES LOIS 277, art. 7.

36. Aug. 2, 1914 (1933) JOURN. DR. INT. 1063.

37. Sept. 28, 1914, 1914 Reichsgesetzblatt 417.

38. By several decrees issued in 1916-1921. Cf. NUSSBAUM, op. cit. *supra* note 35, at 8 et seq.

39. Dec. 21, 1916. See NUSSBAUM, op. cit. *supra* note 35.

40. May 11-15, 1917. See Ténékidès (1923) JOURN. DR. INT. 1013, and (1920) REV. DR. INT. PRIVÉ 29.

41. April 24, 1920. Quoted by the Supreme Court of Austria in the judgment of Oct. 9, 1930 (1931) DIE RECHTSPRECHUNG 15.

42. May 12, 1921. See Madden and Nadler, *The Gold Clause*, BARRONS' (June 6, 1932) 10.

43. July 25, 1931. 7 Diaro oficial of Mexico, July 27, 1931, n. 23.

44. Jan. 15, 1932. La Gazeta, Jan. 16, 1932.

45. June 15, 1932. See "Svensk Forfattningssamling" (1932) No. 212.

46. July, 1933. See Barry, *supra* note 2, at 303, n. 81.

47. By a series of ordinances promulgated in 1933. The Austrian system is extremely complicated. See Loeb and Ritter von Komorzynski-Osyczynski, DIE REGELUNG DER FREIWAHRUNGS- UND GOLDSCHULDVERHÄLTNISSE (Vienna, 1933). A short survey may be found in (1933) 8 ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 464.

48. Nov. 28, 1933. Diario oficial, No. 22455, Dec. 5, 1933.

49. April 26, 1934. Diario de Centro America, May 3, 1934.

50. May 23, 1934. Gazeta Oficial, May 23, 1934.

51. (1928) BULLETIN DES LOIS DE LA RÉPUBLIQUE FRANÇAISE 1631.

52. Several French gold loans, particularly governmental ones were placed in the United States after the War. Furthermore there are certain Alsace-Lorrainers, who in German times undertook gold mortgages on behalf of Swiss banks. Cour de Cassation (Civ.) Jan. 23, 1924, (1924) JOURN. DR. INT. 685. A number of minor French companies had issued bonds payable in francs, at the option of the holder, in certain French and Swiss places, in order to have them quoted on French and Swiss stock exchanges. After the depreciation of the French franc, the debtor companies declared that they would pay French francs, but it was duly held that, the holder having decided for payment in Switzerland, the debt was to be discharged in Swiss francs. Compagnie Électrique de la Loire et du Centre, Cour de Cassation, June 19, 1933 (1933) II. Gazette du Palais 368; Compagnie Est Lumière, Appellate Court of Paris, Jan. 7, 1932, id. 1932 I. 651; Tapèteries

tional payment" or, as the French often say, "international contract," is very vague, and productive of arbitrary decisions which are disagreeable in international relations. The French were to learn that themselves. The Congo State raised in 1901 a loan in Belgium and France. The individual bonds were made payable in gold francs in Brussels at the Treasury of the Congo State and in Paris at Rothschild's. The gold clause having been abrogated by the Belgian statute of 1914, the French creditors argued that this law could not concern international contracts. The Belgian courts—the Court d'Appel, at Brussels, and the Cour de Cassation—adopted the French thesis but defined the loan as a domestic one.⁵³ They held immaterial the fact that the bonds were payable in Paris, and they did not even mention the admission of the loan to official quotation on the Paris Bourse. The French creditors, not fully pleased with the decision, brought an action in Paris against the Belgian State as the successor of the former Congo State. When the Belgian government defended on the ground that the principle of extraterritoriality protected it from suit in any but its own courts, protest was voiced in the French press.⁵⁴ However, by French courts too, the notion of "international payment" has in addition been arbitrarily interpreted to the detriment of foreigners.⁵⁵

Bergès, Appellate Court of Besançon Dec. 30, 1931, id. 1932, I. 656. In the case of the Société Anonyme de Sochaux, however, the same Besançon court, with different judges sitting, gave judgment for the company, Dec. 28, 1931, id. 1932 I. 655. Gold clauses were not incorporated in any one of the bonds mentioned.

53. The judgment of the Cour de Cassation, 1re Ch., dated April 27, 1933, is reported in (1933) JOURN. DR. INT. 739.

54. See *Le Temps*, Oct. 16 and Nov. 22, 1933.

55. An example was given in Nussbaum, *supra* note 3, at 603. And very strange seems to me the decision of the Cour de Cassation, Chambre Civile, dated November 7, 1932, (1933) JOURN. DR. INT. 1197, duly criticized by Professor Perroud, at 1200. In some cases foreign insurance companies, obligated in gold on behalf of French policy holders, were granted the benefit of the abrogation of the gold clause: Cour de Cassation, June 30, 1931, *Gazette du Palais*, 1931 II. 378; Aug. 1, 1932, id. 1932 II. 721; Appellate Court of Paris, 1re Ch., Dec. 31, 1926, (1927) JOURN. DR. INT. 104. But French practice can scarcely be given credit for these decisions, since the contracts were made by the said companies' French branches, which had been put under French regulation and control, by a French statute of March 17, 1905, in order to "frenchify" their business: Cour de Cassation, June 30, 1931, and Tribunal civil de la Seine, 1re Ch., Apr. 13, 1929, (1929) JOURN. DR. INT. 1316. Since the French branches were deprived by virtue of French law of the benefits of the gold clauses with regard to their French investments imposed on them by the statute of March 17, 1905, they were, as quasi-French enterprises, to be protected accordingly against the gold claims of the policy holders, even from a French nationalistic viewpoint. Notwithstanding, the Tribunal de Commerce de la Seine, in the case of a policy made in 1901 with an English life insurance company and phrased plainly in francs, held not only that an "International payment" was involved but also assumed by misconstruction (cf. Cour de Cassation, Nov. 28, 1932, *Gazette du Palais*, (1933) I. 271, concerning a French life insurance company) a tacit gold clause: Judgment of May 6, 1929, Tribunal de Commerce de la Seine, 1re Ch. (1929) JOURN. DR. INT. 1318. In this case, however, the policy was signed partly in London, partly in Paris.

In England the gold clause up to the present has not been restricted by statute. In the *Feist* case, however, the High Court and the Court of Appeal tried, as mentioned before,⁵³ to eliminate a perfectly clear gold clause. The three judges of the Court of Appeal delivered separate opinions, using in part very forced constructions, and differing from each other as well as from the court below, but their conclusion was unanimous. The House of Lords, however, reversed the decision for irrefutable reasons, since no statute comparable to the American Joint Resolution existed in English law. Thus the gold clause was reestablished in English contracts. But it must be remembered that in English contracts, contrary to American custom, the gold clause very seldom appears. Thus, in the *Feist* case, it was a Belgian company that had obligated itself under a gold clause. By virtue of this fact, explicable by historical reasons,⁵⁶ the problem of the gold clause for England has a quite minor economic importance.

There are several foreign decisions which have passed on the legal permissibility of statutes of the same or comparable nature as the American Joint Resolution. In Greece a decree of July 21, 1914, provided that debts contracted in Turkish livre-or (a gold coin) and payable in Greece were to be discharged in Greek paper drachmes at a ratio of 22 drachmes for one livre-or (apparently an under-par ratio). The Court of Appeal at Saloniki held that the decree did not constitute an unconstitutional deprivation of property,⁵⁷ but was justified on the ground that the state⁵⁸ was entitled to regulate the rate of foreign exchange, so that debtors would be protected against excessive damages resulting from the fluctuation of the value of gold. Obviously it would seem inconsistent to grant the legislature less power over *domestic* currency. Another interesting decision of some relevance is that of the Anglo-German Mixed Arbitral Tribunal. A British national, a widow who had been before the war a creditor of a gold debt under German law, sued the German government for damages on the ground that by the ordinance of September 28, 1914, it had abrogated gold clauses. The argument ran that this ordinance was an "exceptional war measure," entitling the injured national of an allied power to compensation under Article 297e of the Treaty of Versailles.⁵⁹ The court dismissed the claim, not considering the ordinance

56. Cf. Nussbaum, *supra* note 3, at 567, 570.

57. Judgment dated Dec. 9, 1922 (1923) JOURN. DR. INT. 1013. Cf. Court of Athens, Judgment of 1933, (1934) JOURN. DR. INT. 185, in which reestablishment of gold clause by Greek decree of July 10/August 5, 1931, was held constitutional. See DARESTRE, *LES CONSTITUTIONS MODERNES* (Paris, 1928) 625 et seq.

58. The French translation reads "le pays."

59. This article reads as follows: "The nationals of allied and associated Powers shall be entitled to compensation in respect of damage or injury inflicted upon their property rights or interest . . . in German territory as it existed on August 1, 1914, by the applica-

as an "exceptional war measure."⁶⁰

Reflecting thus on the legal developments within other countries and contemplating the particular conditions of American law and practice, we cannot consider the Joint Resolution to be an unprecedented or excessive measure. The American Congress, like other legislatures, could not but attempt to mitigate by restriction of the gold clause the dangerous consequences of severe depreciation of the monetary unit. It can scarcely be believed that any constitution should make it impossible to meet so exigent a situation.

These general considerations undoubtedly are relevant also for foreign courts in which the question of the constitutionality of the American Joint Resolution has been or will be raised.⁶¹ Of course after the Supreme Court in Washington has answered the question, its decision will be authoritative for foreign courts. Even such jurisdictions as claim the power to interpret foreign law differently from courts of the country of origin⁶² would, in applying American law, refrain from doing so, as the law-making power of the Supreme Court is everywhere well known. But until the Supreme Court has reviewed the case, foreign courts are free to inquire into the constitutionality of the Joint Resolution. As a practical matter, however, no such difficulty may be expected to arise; for no foreign tribunal is likely to reach an adverse decision on this point. A decision of a Viennese Court of first resort, dated March 1, 1934, in the case of the International Federal Loan of Austria (1930, American section), may be advanced as an example.⁶³ The defendant, the Austrian

tion . . . of the exceptional war measure or measures of transfer mentioned in paragraphs 1 and 3 of the Annex hereto." The paragraphs of the Annex are meaningless for the question before us.

60. *Julia Meyer v. German Government*, Dec. 10, 18, 1924, 4 *RECUEIL DES DÉCISIONS* 666. In fact, the court argued that the German government, by having neither discontinued nor stayed the decree as required with regard to exceptional war measures by art. 297e, had indicated its opinion that the decree was not an exceptional war measure; and the court held further that it was not competent to interfere with the conduct of the German government. This seems very strained since the court was to determine whether or not an exceptional war measure existed, regardless of any government's opinion. Anyway, the conduct of the German government has, in this instance, been disapproved of, directly or indirectly, neither by the tribunal nor by the allied governments.

61. (1933) *JOURN. DR. INT.* 554. Mr. Boris Shatzky, former professor at the University of Petrograd, at present instructor of American Constitutional law at the Sorbonne, strongly advises foreign creditors to challenge the constitutionality of the Joint Resolution in their own courts. He adds: "The combined pressure of European decisions and of American jurisdiction might be sufficient to get tangible results in the question of payment of the debts contracted for."

62. That is true for German and Austrian jurisdiction. Cf. *NUSSBAUM, DEUTSCHES INTERNATIONALES PRIVATRECHT* (1932) 99.

63. (1934) *DIE RECHTSPRECHUNG* 83. The decision has become final since no appeal was taken.

government, invoked the Joint Resolution, but in rebuttal the claimant, a bondholder, contested its constitutionality. The court, reserving its right to an independent examination of the question, pointed out that the claimant had not sufficiently substantiated the rebuttal, saying:

"The 5th Amendment, 'No person shall be . . . deprived of life, liberty or property without due process of law' contains in its first part—the second referring to expropriation—not a rule of substantive but only of constitutional law; therefore the assertion of unconstitutionality cannot be based upon it."⁶³

This argument seems to us utterly inconsistent and obscure, but it indicates the conceivable reluctance of the court to plunge into problematical depths. At present we have already three American judgments, one of a federal court,⁶⁴ one of a Colorado court,^{64a} and one of the New York Court of Appeals⁶⁵ affirming constitutionality, only the Ohio Court of Common Pleas holding to the contrary.⁶⁶ As to American commentators, Professor Collier in his able paper has reached the same result, while other writers without taking a definite position seem partly to incline towards the same solution.⁶⁷ Under such circumstances I think it practically out of the question that the constitutionality of the Joint Resolution will be denied by a foreign court, except on the ground of an American ruling.

II

We have in our previous discussion approached slightly the problem of the international repercussions of the Joint Resolution, a problem to which we may now devote ourselves in greater detail. The importance of charting the operative extent of the Resolution is manifest when it is recalled that a great part of the creditors as well as the debtors of the bonded loans issued in the United States are foreigners residing abroad. For example, many capitalists in Europe, and probably in other countries as well, by reason of domestic monetary troubles bought American gold bonds in the belief that they would get by them protection against any depreciation. But that is far from being all. In addition to the bonds, doubtless numerous business relationships between American and other people have been carried out on a gold dollar basis. This basis has even

64. *In re Missouri Pacific Rr. Co.*, 7 F. Supp. 1 (1934).

64a. *Kennedy v. Conrad*, *supra* note 16.

65. *Norman v. Baltimore & Ohio Rr. Co.*, N. Y. L. J., July 19, 1934, at 1. This decision was recently followed by the Supreme Court of New York in *Levy v. Asbestos, Ltd.*, N. Y. Times, Aug. 30, 1934.

66. Judgment dated March 10, 1934, in *Equitable Life Ins. Society v. Freda*, 78 Cong. Rec., March 15, 1934, at 4622. The court argues that the abrogation of the gold clause would amount to confiscation of creditors' property without compensation. The court holds such confiscation cannot be intended, and is not provided for, by the statute. The assumption of unconstitutionality is here, of course, poorly disguised.

67. Cf. Hanna; Post and Willard, both *supra* note 2.

been widely adopted in contracts made exclusively between non-Americans—for instance, in domestic and foreign insurance. In all these relationships the question arises whether the Joint Resolution must apply, or the law of one of the many nations which have not restricted the effect of gold clauses at all, or which have abrogated merely gold *coin* clauses and not gold *value* clauses.⁶⁸ Thus both the financial importance of the Resolution and its possible territorial extent are quite unprecedented in legal history.

The Conflict of Laws

In exploring the limits within which the Joint Resolution operates, we must first examine the pertinent rules of the Conflict of Laws in an attempt to discover what kinds of contracts are governed by American law. On this point important precedent is afforded by a decision of the Permanent Court of International Justice. Before the World War, Serbia had floated several issues of bonds, made payable in "francs-or" (gold francs) at different places.⁶⁹ Some of these places, for instance Berlin and Vienna,⁷⁰ were situated outside the territories of the Latin monetary union, the unit of which was the "franc." If the holder presented the bond at such a place, he had to receive in the local currency the value of the francs fixed in the bond (or in the coupons thereto) at the current rate of exchange on Paris. Similar bonds had been issued before the war by the Brazilian government. When the French courts, subsequent to the depreciation of the franc, held the gold clause to be void, the debtor governments refused to pay more than the face declaration of francs (or the value thereof in local currency) as indicated on the bonds and coupons. The French government, acting in the interest of French bondholders, rejected this defense. Therefore the French government on the one hand, and the Serbian and Brazilian on the other hand, agreed to submit the case to the Permanent Court of International Justice at The Hague. The court gave judgment for the French government. It pointed out that the loan contracted by a state is governed generally by the law of that state, provided it has not submitted to some other law. This having not happened in the case at bar, Serbian law would be

68. The German ordinance of September 28, 1914, has been construed as referring only to gold coin clauses, German Supreme Court, Dec. 3, 1924, *JURISTISCHE WOCHENSCHRIFT*, (1925) 1483; likewise the Egyptian ordinance of August 7, 1914, Civil Tribunal of Alexandria, March 21, 1933 (1933) *JOURN. DR. INT.* 1058. In the German case, the gold clause, nevertheless, was held completely ineffective, according to the theory of the *Reichsgericht* discussed in text accompanying note 12, *supra*.

69. I lay aside doubts regarding the contractual currency dissolved by the courts as stated above.

70. The individual issues of the bonds are somewhat differently phrased in terms of place of payment and other points, but those differences are quite immaterial in law.

applicable to the loans⁷¹ with respect to the "substance of the debt." Nevertheless it was the opinion of the court that "the money in which the payment must or may (doit or peut) be made in France depends on French law." "Indeed," continued the court, "it is commonly accepted that each state is entitled to determine itself its own currency."⁷² Therefore French law would govern the gold clause, which consequently must be upheld as resting on an "international contract."⁷³

The shortness of this fundamental proposition contrasts with the copiousness of the court's argument upon minor points. There are doubts as to what the court really means. Shall French law apply because the basic currency of the loan is French, or because the place of payment is situated in France? Or have both those facts together been considered as decisive?

However, neither singly nor combined are they sufficient to justify the opinion of the Court. Untenable at any rate would be the proposition that would make the validity of the gold clause dependent upon the law of the state in the currency of which the amount of the debt has been fixed, (upon the "Währungsstatut,") as opposed to the "Schuldstatut,"⁷⁴ the law governing the obligation as a whole. If this proposition should be the real meaning of the judgment, the Court might possibly have been influenced by the conception that the law abrogating the gold clauses formed part of the monetary system in reference to which the parties had contracted. ("The State is entitled to determine itself its own currency.")⁷⁵ This, in any case, would be wrong when the abrogation, as under French and American law, extends to gold value clauses. In such case, as we have already indicated, not a monetary rule, but a rule of the law of Contract is involved.

But even when only gold coin clauses are affected by the law, the "Währungsstatut" could not control the case. We mentioned before

71. And Brazilian law to the Brazilian loan. We do not henceforth mention the latter, since the argument is quite the same as in the Serbian case.

72. Cour permanente de justice internationale de la Haye, (1929) JOURN. DR. INT. 1005.

73. Under Serbian law the gold clause was probably void, according to the Serbian statute of April 24, 1920, mentioned before. The Serbian government, however, did not, in the hearings, refer to the statute. Whether there were political considerations for not doing so or whether the Serbian statute did not cover governmental loans, I cannot discover, as I could not ascertain the whole text of it. In general, the defense of a debtor state derived from its own laws is good, inasmuch as the law of the state is applicable, *infra* page 85. As the Serbian state did not avail itself of the defense but on the contrary sought protection under French law, the court's decision, in its result, may be justifiable by reasons of procedure. Even those reasons do not clearly come out in the opinion. We are contemplating only the arguments of substantive law advanced by the court.

74. In German legal terminology "Statut" means a territorial legal system as opposed to other territorial legal systems; "Währung" means a monetary system.

75. See note 72, *supra*.

that numerous contracts without any substantial relationship to American territory have been made between European parties in terms of gold dollars. It would be obviously unjustifiable to apply American rules on the gold clause to such contracts. The analogous situation exists with regard to contracts in "francs-or," widely used in Eastern Mediterranean countries.⁷⁶ If the parties to a contract agree upon a gold clause it is because they wish the debt to be independent of unexpected vicissitudes of the contractual currency. Therefore, as soon as the gold clause is incorporated into a contract the question of currency becomes secondary. Thus the Supreme Court of Denmark duly held English law not applicable to the gold clause of a contract made between a Norwegian shipping company and a Danish dockyard for payment, in Copenhagen, of English pounds "in gold."⁷⁷ This happened after the English Court of Appeal, but before the House of Lords, had passed on the question in the *Feist* case. Therefore, the Danish Court was confronted with a rule setting aside gold coin clauses.⁷⁸

The theory that in respect to the validity or non-validity of the gold clauses the "Währungsstatut" should control seems to be so objectionable that the judgment of the Permanent Court is probably to be given the other interpretation, namely that the law of the place of payment must decide.⁷⁹ That the law of the "place of performance" determines

76. Nussbaum, *supra* note 3, at 571. In Germany, too, numerous contracts between residents have been made in "gold dollars." Wolff, *INTERNATIONALES PRIVATRECHT* (1933) 101 admits that these contracts are not subject to the Joint Resolution. See, however, *infra* note 134.

77. Judgment of June 21, 1933, 7 *ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT* 960. The decision rests on the opinion of the English Court of Appeal, making the gold clause inoperative, *supra* note 3.

78. See note 13, *supra*, and accompanying text. *Contra*: Supreme Court of Austria, judgment dated March 12, 1930, (1930) *DIE RECHTSPRECHUNG* 105. An Austrian property owner mortgaged his estate to a German life insurance company for a debt expressed in gold marks. The liability of the owner was, since connected with Austrian real estate and contracted in Vienna, clearly governed by Austrian law. The court, however, held the gold clause vitiated by the German ordinance of Sept. 28, 1914, which is construed as referring only to gold coin clauses. See note 68, *supra*. This opinion, however, was auxiliary: the decision rests primarily on different grounds. In *Modiano v. Bailey*, 50 T. L. R. 43 (Ch. D. 1930), the following peculiar gold dollar clause was embodied in a bill of lading issued by a Norwegian shipowner: "Freight collect on basis of pound Sterling equal to \$4.86 U. S. gold: shipowners to have option of collecting U. S. dollars or their own country's currency at ruling rate of exchange for U. S. gold dollars." Application of American law was not pleaded.

79. A recent Polish ordinance (June 12th, July 7th, No. 59,509) has provided that validity of all gold clauses litigated in Polish courts shall depend upon the "Währungsstatut." Ziffer, *Die polnische Verordnung über die Erfüllung von Valutaverpflichtungen* (1934) *MITTEILUNGEN DES VERBANDES ÖSTERREICHISCHER BANKEN UND BANKIERS* 254. Probably the Polish authorities were influenced by an interpretation of this decision of the Permanent Court contrary to that reached by the writer.

the manner of performance, and, especially, the medium of payment in which the promise to pay money is to be performed⁸⁰ is a well settled rule of law not confined to the United States.⁸¹ But this rule does not apply here at all. Whether the payment may be made in gold coins or in silver coins or in notes, that relates indeed to the manner or the "medium" of payment.⁸² This, however, was not the point in the *Serbian and Brazilian* cases. The Permanent Court did not construe the expression "franc-or" as a gold coin clause, but exclusively as a gold value clause. It held the Serbian and Brazilian governments liable to pay the bondholders, in the local currency of the contractual place of payment chosen by the bondholder, a sum equivalent to the value of the gold coins corresponding to the amount of "francs-or" mentioned in the bonds.⁸³ Here is no longer the question of the "manner of payment," but clearly of the "substance of the debt," as the amount of the debt is, of course, an essential element of the debt. Therefore, owing to the distinction made by the court, Serbian law should have been decisive in respect to the validity of the gold clause.

But even though the place of payment doctrine be accepted, the theory of the case still raises grave difficulties. It is not made clear by the court why Paris should be the place of payment. One may, considering the text of the bonds given above, eliminate Berlin and Vienna, as the text fixes principal and interest neither in German nor in Austrian currency; but at least Paris, Brussels and Geneva are coordinated as places of payment.⁸⁴ In Geneva, too, the payment "must or may" be made, at the option of the bondholder, in "francs-or." Why not apply Swiss law? No reason for answering in the negative is apparent unless it may be that the bondholders asked for payment in Paris and that the court was influenced by that fact; but it is not even alleged in the court's very general argument, that the bondholders did ask for payment in Paris.

80. RESTATEMENT, CONFLICT OF LAWS (Final Draft No. 2, 1931) §§ 391, 353 (f).

81. See LORENZEN, CASES ON CONFLICT OF LAWS (3d ed. 1932) 388, n. 18, referring to French, German, Italian and Brazilian law. For instance the German CODE OF COMMERCE, paragraph 361, reads: "Measures, weights, currency, computation of time and of distance, as used in the place of performance, must, in case of doubt, be considered contractual."

82. RESTATEMENT, CONFLICT OF LAWS (Treatise accompanying Tent. Draft No. 4, 1928) 35, refers "to the nature of currency by which obligation may be met," quoting *Benners v. Clemens*, 58 Pa. 24 (1868); *Grunwald v. Freese*, 1 Okla. 366, 34 Pac. 73 (1893); *Comstock v. Smith*, 20 Mich. 338 (1870). The ruling of these cases is that a contract made payable in a foreign country is supposed to contemplate a payment in the currency of this country. That does not, of course, concern the question discussed by the Permanent Court and by our text.

83. (1929) JOURN. DR. INT. 1008.

84. For Belgrade the meaning of the bond is uncertain. It is not worth while to enter into this question.

Nevertheless the Permanent Court's decision, which has received wide consideration,⁸⁵ has been cited for the proposition that the controlling "place of payment" is the one in which payment is demanded. The City of Vienna issued in 1922, for a loan received, bonds of the following type: "500 crowns = 425 marks payable in Berlin = 525 francs payable in Paris, Brussels or Basle = 100 U. S. A. gold dollars payable in New York." By an Austrian statute of January 27, 1922, the city of Vienna was authorized to discharge the bonds by paying the bondholder, in Austrian crowns, the amount of Austrian currency as stated in the bonds. The effect was to deprive the bondholders of their rights, as the Austrian crown had depreciated nearly to zero. A bondholder brought, in the Berlin court, a suit against Vienna for payment, in Zurich, of the full amount in Swiss francs, as indicated in the bonds. The German Supreme Court (Reichsgericht) held for the claimant.⁸⁶ Quoting and joining the opinion of the Permanent Court, the Reichsgericht pointed out that the loan of an Austrian city is governed by Austrian law, but that Swiss law alone must answer the question whether or not Swiss francs have to be paid in Zurich, chosen as place of performance by the bondholder. In this way the Austrian law, theoretically acknowledged to be fundamental, was practically eliminated.

In our opinion, the validity of the gold clause must be considered to rest on the legal system which, in general, determines the validity or non-validity of the contract. This choice of law can be made only by application of the rules of the "lex fori." So far, an inclusive solution seems impossible. However, the problem itself, the methods of approach, and the uncertainty of law, are everywhere almost the same. Thus, pertinent discussion of the subject made with reference to one country may be found to be useful in other countries too.

The Restatement of Conflict of Laws decides in favor of the law in force at the place of contracting.⁸⁷ But it is set forth in the commentaries to the Restatement that this rule has, until now, won little authority. The opinion laid down by Lord Mansfield that the validity of a contract is governed by the law intended by the parties—or, in the language of Dicey, by the "proper law of the contract"—has not only prevailed in England but has been adopted in more American states than any other view.⁸⁸ It is well known, furthermore, that the reasons

85. It had been quoted by the House of Lords in the *Feist* case (for the construction of the typical gold clause as a gold value clause), by the Swiss Federal Court in the *Heraclea* case, by the United States Federal District Court in the *Missouri Pacific* case, and by the Tribunal Civil Mixte of Alexandria in the judgment, *infra* note 126.

86. Judgment dated November 14, 1929, 126 *Entscheidungen des Reichsgerichts in Zivilsachen* 196.

87. RESTATEMENT, CONFLICT OF LAWS § 332(d).

88. RESTATEMENT, CONFLICT OF LAWS (Treatise accompanying Tent. Draft No. 4, 1928) 21 et seq. See further, GOODRICH, CONFLICT OF LAWS (1927) 228.

advanced by Beale, the reporter of the Restatement,⁸⁹ and by the Commentaries to the Restatement, are vividly criticized by outstanding writers like Lorenzen,⁹⁰ and they are discordant with foreign decisions based on principles similar to the American doctrine of Conflict of Laws.⁹¹ For the problem before us, the solution offered by Beale and by the Restatement is unsatisfactory in any case. Suppose that we are concerned with a bond loan wholly phrased in the well-known type of American bonds, stated in terms of gold dollars, referring everywhere to American law and custom, payable in the United States, quoted on the New York Stock Exchange, placed among American capitalists; if it is executed or even merely delivered abroad,⁹² the American legal system as a whole would be quite inoperative with regard to the validity of the bond. Were the bond (debenture) delivered abroad, but the underlying contract between the debtor and the financing American banker (indenture) executed in the United States,^{92a} or vice versa, these dual instruments, although very closely connected and, as a matter of course, literally adapted to each other, would be governed by different legal systems. The customary clause:

"This agreement shall be deemed to be a New York contract and all rights arising thereunder shall be interpreted and performance thereof shall be governed in accordance with the laws of the State of New York in the United States of America⁹³ and enforced accordingly"

would not change the situation, since the Restatement, neglecting the needs and the results of practice,⁹⁴ attempts by theoretical bias to exclude any consideration of an agreement designing the system of law applicable. It is not possible within the scope of this article to explain the

89. (1909) 23 HARV. L. REV. 1, 79, 194, 260.

90. See Lorenzen, *Validity and Effects of Contracts in the Conflict of Laws* (1921) 30 YALE L. J. 565, 655, (1921) 31 YALE L. J. 53; McClintock, *Conflict of Laws as to Contracts: Minnesota Decisions* (1926) 10 MINN. L. REV. 498; Stumberg, *Conflict of Laws—Validity of Contracts—Texas Cases* (1932) 10 TEX. L. REV. 163.

91. Compare for instance DICEY, *CONFLICT OF LAWS* (Keith, 5th ed. 1932) 958 et seq.; for German and Swiss law, see NUSSBAUM, *op. cit. supra* note 62, at 237 et seq.; and, giving a general survey, FICNER, 4 *RECHTSVERGLEICHENDES HANDBÜCHER FÜR DAS ZIVIL- UND HANDELSRECHT* (ed. by Schlegelberger) 364.

92. See RESTATEMENT, *CONFLICT OF LAWS* § 312: "Except as stated in § 313, when a formal contract becomes effective on delivery, the place of contracting is where the delivery is made."

92a See RESTATEMENT, *CONFLICT OF LAWS* § 325: "In the case of an informal bilateral contract, the place of contracting is where the second promise is made in consideration of the first promise."

93. That the laws of the United States form part of the law of the State of New York is naturally implied. So the Hague court stated in the Royal Dutch case, *infra* note 104.

94. Express agreements on the law applicable are customary in international contracts, and from a practical view not objectionable at all.

principles which, in our opinion, should be followed in choosing the law determining the validity or non-validity of a promise.⁹⁵ What seems to us impossible, in any event, is the elimination, in this question, of the legal system of the territory which is mainly connected with the promise (or contract). If, under this system, the contract is wholly or partly vitiated, this fact must be respected by the "lex fori," i.e. by the court of every foreign jurisdiction. Therefore each gold dollar bond which, considered as a whole, must be considered American,⁹⁶ is affected by the Joint Resolution. The same is true for a debt secured by a mortgage on American real estate, provided the mortgage was a major condition of the credit.

In determining with what state the contract is mainly connected, particular consideration must be given to the place of payment. The importance of that place has, on the authority of Savigny, been widely exaggerated in Central European practice,⁹⁷ and the same trend has, through Story,⁹⁸ influenced the development of American law. But for bonds, notes, and negotiable instruments (not for obligations arising out of sales, leases, contracts for work, partnerships and other bilateral contracts), the place of payment offers indeed the most visible "point de rattachement," and this corresponds with the general view in business which lays stress upon this element of the promise. Therefore, the law of the place of payment must most often be considered the law governing the promise, and consequently, its validity. So we approach somewhat the doctrine of the Permanent Court. Notwithstanding, considerable divergence remains. The bearing of the territorial relationship created by the place of performance depends upon the special circumstances of the case. If there are several alternative places of payment situated in different countries, they can not govern the choice of law. Nor can the exercise of the option by the bondholder be held decisive, as supposed by the Reichsgericht. Strengthening the discretionary power of the bondholder to such an extent would unduly burden the debtor, and split up the homogeneous loan into an indefinitely changing variety of pieces governed by different laws. And what law should govern, so long as the bondholder has not exercised the option? It is impossible to have a contract legally "in vacuo" and it is not less unsatisfactory to have the legal system applicable prior to the exercise of the option suddenly supplanted by another in consequence of the bondholder's

95. I attempted to do so in NUSSBAUM, op. cit. *supra* note 62, at 236 et seq., 244 et seq.

96. See the phrase "This agreement shall be deemed to be a New York contract" in the clause mentioned above.

97. See NUSSBAUM, op. cit. *supra* note 62, at 217 et seq.

98. See STORY, CONFLICT OF LAWS § 280.

decision. After all, in the case of the Serbian loan, we believe Serbian law applicable, all the more since Belgrade was the place of contract as well as one of the places of performance.

We must, however, distinguish between the place of "payment" and the place of "collection." This is shown by the customary clause discussed by the Hague court, in the Royal Dutch case, and worded as follows:

"At the option of the bearer, the Company is bound . . . to pay to the bearer hereof . . . in the Borough of Manhattan, The City of New York, U. S. A., 1000£ in gold coin of the U. S. A. of or equal to the standard of weight and fineness as it existed on April 1, 1930. . . .

"At the option of the bearer . . . the principal of and interest on this debenture shall be collectible as provided below at any of the following optional places of collection: in the City of Amsterdam, The Netherlands, . . . in Dutch guilders; in the City of London, England, . . . in pounds Sterling; in the cities of Basle or Zurich, . . . in Swiss francs; or, in the City of Stockholm, . . . in Swedish kronor; in each case, at the buying rate in such optional place of collection for sight exchange on New York on the date of presentation of this debenture and/or the coupons appertaining hereto."

In this case, New York is the place of payment; Amsterdam, London, Basle, Zurich, Stockholm are places of collection. The very careful phrasing of the bond, the whole text of which cannot be reproduced here,⁹⁹ makes it clear that "payment" and "collection" express different concepts. Obviously, the rules relating to the place of payment should be exclusively applied to New York. The expression of this intention cannot be considered to be a playing with words. As a matter of fact, the debt's connection with New York is the major one; not only the fiscal agent intrusted with the service of the loan is located here, but American currency is basic for the loan, and the amounts to be paid, in local currency, in Amsterdam, London, Basle, Zurich, Stockholm, are determined by the exchange rate on New York.¹⁰⁰ The place of payment is a necessary element of the debt, and in case it is not specified by the parties, it must be determined by construction; places of collection are added simply as facilities to the bondholders.¹⁰¹ Similar dis-

99. It is to be found in *Weekblad van Het Recht*, March 8, 1934, No. 12719.

100. There is no "option de change," but only "option de place." The "option de change" would require that the amounts to be paid in one of the optional currencies should be fixed by the bond in advance as independent of each other. An example is offered by the Vienna investment loan, *supra* page 70. On the "option de change" and "option de place" there is an abundance of decisions. See NUSSEBAUM, *op. cit. supra* note 35, at 70 et seq.

101. In the same sense, Appellate Court [Hof] of Amsterdam in the case of the loan of *Compagnie Internationale des Wagonlits et des Grands Express Européens*, judgment of Dec. 11, 1929, *Weekblad van Het Recht* No. 12121 (1930). Brussels being the domicile

inctions are made by foreign laws. Thus German law contrasts "Erfüllungsort" or—with regard to debts—"Zahlungsort" ("place of performance" and "place of payment") and "Bestimmungsort" ("place of destination"), the rule being that in case of doubt the debtor has to pay at his domicile ("Zahlungsort") but nevertheless to send the money, at the creditor's cost and risk, to the latter's residence.¹⁰² And French decisions distinguish between "lieu de paiement" and "lieu de versement," the former being the only place where the payment *must* be made, the latter being, on special agreement, in the option of the debtor.¹⁰³ Generally speaking, then, the place of payment is not always identical with the place in which the creditor actually receives the money. In the matter of gold clauses, major importance, if any, should be attributed only to the place of payment.

Several recent decisions illustrate an accurate use of the proper rules of the Conflict of Laws. The Hague court of first resort recently held, in the cases of the *Royal Dutch Shell* and the *Batavia Petroleum Company*,¹⁰⁴ both involving gold loans issued in the United States, that American law was applicable, on the ground that the standard clause expressing intent to be governed by American law¹⁰⁵ was embodied in the bonds. Even putting aside this clause, the applicability of American law could not be doubted, as the bonds were in every respect adapted to American law and custom, particularly stating New York as place of payment.¹⁰⁶ The proper theory was set forth also by the Supreme Court of Austria in a decision dated February 12, 1929. An Austrian insurance company in 1906 made an insurance contract with an Austrian resident in terms of German gold marks payable in Vienna. After the war the company tried to avail itself of the German ordinance of September 28, 1914.¹⁰⁷ The court held that the defense was not good, and that the debt was exclusively governed by Austrian law, the closest connections of the contract evidently leading to Austria.¹⁰⁸ Unfortunately, the court, to the

of the company and the place of payment, Belgian law was held exclusively applicable although there were facilities for collection in Cologne, Amsterdam, London and Paris. The same loan came before the French Cour de Cassation, judgment of December 6, 1933, *Gazette du Palais* 1934 I. 298; the adjudication was similar.

102. GERMAN CIVIL CODE, par. 269, I (2) and par. 270, IV; see NUSSBAUM, *op. cit. supra* note 3, at 74 et seq.

103. Cf. Perroud (1924) *JOURN. DR. INT.* 635, n. 28, and decisions quoted there.

104. Judgments dated February 15, 1934, *Weekblad van Het Recht*, March 8, 1934, No. 12719.

105. For the wording of this clause see notes 93, 94, *supra*, and accompanying text.

106. In the *Royal Dutch* case, however, the court by misapprehension of the meaning of the Joint Resolution, held that the loan did not come within its terms. See note 143, *infra* and accompanying text.

107. NUSSBAUM, *op. cit. supra* note 35, at 84.

108. (1929) *DIE RECHTSPRECHUNG* 107.

prejudice of a German company, later abandoned this view.¹⁰⁹ A correct decision was given furthermore by the court of Copenhagen in the case of *Soderberg v. Telephone Company of Copenhagen*,¹¹⁰ where the Joint Resolution was applied. Since a loan of the company was exclusively placed in the United States, and since principal and interest were payable only in American dollars in New York, at the Guaranty Trust Company, as fiscal agent, evidently the court concluded from these facts that the loan as a whole was governed by American law.

"Ordre Public"

Suppose American law were held to govern the contract according to the rules of "lex fori." The further question arises whether or not the application of the Joint Resolution will be refused on the ground that it violates the "ordre public" (public policy) of the country in which enforcement is sought. It is well known that in continental systems of private international law the notion of "ordre public" can everywhere check the application of foreign law. It gives the courts a large discretion, enabling the judge to refuse the application of any foreign provision considered harmful to fundamental domestic interests; and it is possible for the judge to use this discretion to refuse enforcement to a foreign statute abrogating or restricting the gold clause. But in practice the courts seem to be cautious; indeed they are rather reluctant to make use of the "ordre public" concept. In the case of the Vienna investment loan the Berlin Appellate Court (Kammergericht) pointed out that the application of the Austrian statute of January 27, 1922, would be injurious to German public policy.¹¹¹ The fact that gold clauses had been abrogated by German law too, was not mentioned in the opinion of the court. Nevertheless, the argument was clear and consistent in itself, for in the field of "ordre public" the judge has to take care only of domestic interests. On appeal, however, the German Supreme Court (Reichsgericht) reached the same conclusion by application of the place of payment theory,¹¹² evading, obviously on purpose, the "ordre public" issue. An allegation that German "ordre public" had been violated might have been felt by the Reichsgericht to be hypocritical or an unfriendly act toward Austria.

We know of no cases in any other court than the Berlin Kammergericht expressly declining the application of a foreign gold clause statute for reasons of public policy.¹¹³ There are, however, several which seem to

109. *Supra* note 78.

110. Not yet published.

111. Judgment of July 2, 1928, 28 Bankarchiv 27.

112. See note 86, *supra*, and accompanying text.

113. Cf. judgment of the Berlin Appellate Court (Kammergericht) of December 28, 1922, (1923) JURISTISCHE WOCHENSCHRIFT 128, concerning a Polish ordinance. The situation was a very special one. Cf. NUSSBAUM, *op. cit. supra* note 3, at 162.

rest tacitly on that ground. In a case before the Tribunal Civil de la Seine, an Italian railroad company was sued for payment of "gold-lire" bonds issued by the company. The defendant set up an Italian ordinance enabling certain Italian companies to discharge their gold bonds by paying the face value of the bonds in lire plus an additional amount of 25 per cent, although the lire had kept only about 25 per cent of parity. The court held that the defense was not good, the ordinance not being applicable; but the court gave no reason for this decision.¹¹⁴ A Polish monetary ordinance dated March 19, 1924, was involved in the case of the *Société des Charbonnages de Sosnowice*, decided by the Appellate Court of Paris.¹¹⁵ The ordinance invoked by the defendant had reduced the obligations issued by Polish companies and expressed in foreign currency, to one-third in value. In this case likewise, the court, without giving further explanation, held that the ordinance was not applicable.

So far European courts have evinced no inclination to apply the concept of "ordre public" to defeat the application of the American Joint Resolution. Although some foreign writers have attacked this statute as violative of the fundamental international rule of "pacta sunt servanda" and have urged that any defense derived from the Resolution be rejected,¹¹⁶ nevertheless the Hague,¹⁰⁴ the Vienna,¹¹⁷ and the Copenhagen¹¹⁰ courts of first resort, which alone have had occasion to deal with the question,¹¹⁸ have all declined to hold the American statute contrary to domestic policy. The Hague court says:

"There cannot be any question about violation of public order, as the measure [the Joint Resolution] has, according to its purpose set forth in the preamble, been enacted, as required by urgent necessity and public [American] interest, and not at all—here the claimant himself agrees—in order to injure the creditors."¹⁰⁴

114. *Société Italienne de Chemins de Fer Méridionaux*, January 18, 1928, *Gazette du Palais*, 1928 I. 815.

115. Decision of April 19, 1928, *Cour de Paris* (1re Ch.), (1928) *JOURN. DR. INT.* 695.

116. Thus Shatzky, *Repudiation de la Clause Dollar Or par les Etats Unis* (1933) *JOURN. DR. INT.* 539; CORDS, 33 *BANKARCHIV* 348; similar arguments are set forth by PASCHING, *MITTEILUNGEN DES VERBANDES OSTERREICHISCHER BANKEN UND BANKIERS* (1933) 180, who refers particularly to § 37 of the Austrian Civil Code, which submits contracts made outside of Austria between an Austrian and non-Austrian, to Austrian law, provided that the parties of the contract did not obviously intend to take as a basis another law. This intention, however, is invariably to be found in the cases here described. Besides that, there exists in Austria special statutes taking precedence over the general regulations of the Civil Code. See note 47, *supra*.

117. Judgment of the *Bezirksgericht, Innere Stadt Wien*, March 1, 1934, (1934) *DIE RECHTSPRECHUNG* 82.

118. The German Appellate Court of Cologne, too, dealing with the gold dollar bonds of the *Vereinigte Stahlwerke* shortly expressed the opinion that some series of the bonds are deprived of their gold clauses by the Joint Resolution as informally reported by the *Berliner Tageblatt* of July 16, 1934, No. 331.

This appreciation by the Hague court of the Joint Resolution is the more important, as Holland is one of the few countries which have not restricted gold clauses at all. For courts of other countries, it is evidently still more difficult to take another attitude.¹¹⁹ The reasoning of the German Reichsgericht in the Vienna investment loan case proves this;¹²⁰ and the Vienna court, contending that Austrian "ordre public" was not involved, rests its opinion expressly on the fact that Austrian law likewise had restricted gold clauses.¹¹⁷

Yet these three courts have not even proposed the argument which may be considered strongest for recognizing the Joint Resolution in international relationships. It consists in the fact that the American legislature has consciously extended the effects of the Joint Resolution to non-American debtors obligated in gold to American creditors. Secretary of the Treasury William H. Woodin delivered, after the House and Senate committees had favorably reported on the Resolution, the following explanation of it:

"Internationally, adoption of the resolution might mean a reduction of more than \$2,500,000,000, in terms of foreign currencies, in debts owed to the American Government and American business by foreign debtors. There would not be a commensurate loss to the American creditors unless they wished to use the repaid funds internationally.

"Treasury and Commerce Department figures show that this reduction would result because payments from abroad on private or governmental debts need no longer be made in gold. Dollars of any type, which have been selling at a discount of at least 10 per cent in terms of foreign monies, could be purchased and used to discharge the debt. Since the governmental debts owed Americans total more than \$11,000,000,000, and the long term investments of Americans abroad amount to more than \$15,000,000,000, the reduction in terms of foreign currencies as long as the dollar continues to sell at a discount of 10 per cent could aggregate about \$2,500,000,000."¹²¹

And in the House hearings of May 29, Representative McFadden of Pennsylvania stated:

"This repudiation bill was framed and brought here in the interests of the foreign debtors of the United States. Its aim is a cancellation of war debts by fraud and treachery toward the American people. It gives the foreign nations

119. I do not say impossible, since, as mentioned before, only domestic interests are controlling in this question.

120. CORDES, *op. cit. supra* note 116, at 351, declares that the German ordinance of 1914, which is still in force and will of course remain so, is "transitory." He furthermore does not mention that the Reichsgericht, by means of par. 245 of the GERMAN CIVIL CODE, and by means of interpretation, has made the gold clause practically inoperative, as shown in the text above note 12, *supra*. So he reaches the conclusion that it would be wrong to put German and American law on the same level.

121. U. S. News, May 20-27, 1933, p. 3, col. 2.

a way of making entirely fictitious payments of the war debts. It permits them to use the Federal Reserve currency and United States credit which was unlawfully taken by the Federal Reserve Board and exploited abroad. The United States Treasury has been drawn upon by the Federal Reserve Board for paper money and for credit exchangeable for money, and these, unlawfully taken, have been sent to the debtor nations."¹²²

These assertions are, of course, somewhat askew. It must be appreciated, however, that the American statute requires, in a sense of fairness and at American cost, a thoroughly equal treatment of non-American debtors as well as creditors. It would have been a fairly shrewd stroke of business for the United States to exclude from the benefits of the act, according to the French doctrine, contracts involving "international payments." Such an exception would have brought in a profit to the United States similar to or greater than that taken by France. Furthermore, in view of the ambiguity of the concepts, "international payment" and "international contract," the American ruling must be preferred from the standpoint of international equity.

Nevertheless, the French courts are likely to decline the application of the Joint Resolution. The Tribunal Civil de la Seine recently laid down, in *Boncompagne v. Crédit Foncier Egyptien*,¹²³ an opinion which seems noteworthy. The Credit Foncier Egyptien had issued, before the war, bonds payable in gold at Paris, London, Brussels, Geneva and in Egypt. The bank refused to pay the gold value, as a decree of the Khedive, dated August 2, 1914,¹²⁴ had abrogated the gold clause. The court held for the claimants (bondholders):

"Considering that the 'cours forcé' measure taken for reasons of national interest is limited to the territory of the nation having established it and does not run with the securities circulating abroad;

"Considering the defendant cannot take advantage of the 'cours forcé' (le cours forcé n'est pas opposable) in the matter of international payment;

"Considering that in the case at bar an international payment is involved."¹²⁴

By "cours forcé" it is meant that: (1) bank notes are legal tender (that they have "cours légal"); and (2) that those bank notes cannot be converted into gold. The idea seems to be that under these circumstances the notes must be accepted by creditors only within the territory of the state concerned. French doctrine presupposes that the abrogation of the gold clause forms part of the "cours forcé." It was from these premises that the conclusion was drawn that the abrogation of the gold clause by French law could not be referred to "international

122. 78 CONG. REC. 4538 (1934). Similar viewpoints were advanced by Representative Beedy, *id.* at 4542.

123. May 31, 1933 (1934) JOURN. DR. INT. 368.

124. See note 36, *supra*.

payments."¹²⁵ Now the Tribunal Civil de la Seine applies the same order of ideas to foreign—in this case to Egyptian—monetary law. The theoretical basis is not made quite clear. Does the court interpret the Egyptian statute as meaning that only domestic payments are to be affected by it, or does the court intend to lay down a rule of French private international law, according to which French "ordre public" prevents the application by French courts of foreign laws introducing the "cours forcé," with its supposed concomitant gold clause abrogation? By the second alternative, only French interests would be protected; whereas the first alternative would lead to the result that the foreign gold clause statute would be considered ineffective in any case of international payment, that is to say, even if French interests were not concerned. The writer does not think that this construction is contemplated by the court, which argues apparently on the ground of French law.¹²⁶

The French doctrine is very unsatisfactory and has been criticized by outstanding French writers.¹²⁷ It is misleading to say that the "cours forcé," as opposed to the "cours légal," is limited to national boundaries. The "cours légal," to wit, the attribution to certain pieces of paper of the quality of legal tender, ends indeed at the frontiers of the state. Only within this territory must creditors accept these papers as payment at face value, whether the papers be convertible or not. However, the fact that the notes are legal tender (the "cours légal") has nothing to do with the validity or invalidity of the gold clause in any case.¹²⁸ Moreover, the question of convertibility concerns only the relationship between the holder of the paper, domestic or foreign, and the issuing bank. Hence

125. See notes 51, 52, *supra*, and accompanying text.

126. The Tribunal Civil of Cairo, court of first resort, has held by a judgment of June 5, 1933, in *Sursock v. Crédit Foncier Egyptien*, that the Egyptian laws on "*cours forcé*"—the court had in mind the decree of August 2, 1914—do not cover international payments. (1933) *JOURN. DR. INT.* 1060. This would favor the first alternative. But the decision of the Cairo Tribunal was issued later than the French, and its argument is very disputable. The Tribunal Civil of Alexandria, in *Levy & Paquier v. Land Bank of Egypt*, January 11, 1934, (1934) *JOURN. DR. INT.* 706 construing the same decree goes even further. It seems to assume the theory that no national legislature is able to reach contracts involving an "international character." A gold obligation contracted in 1918 between Russians in the Ukraine, contrary to Bolshevik law, was held valid by the Tribunal Civil de la Seine, Jan. 1, 1930, *Gazette du Palais*, 1930 I. 488, on the ground that under the rule of the "white-guardist" General Denikin, old Russian law not derogating the gold clauses had to apply. In the field of international private law there are probably few cases applying law emanating from that general.

127. I quote only Nogaro, (1925) *REVUE TRIMESTRIELLE DE DROIT CIVIL PRIVÉ* 5 et seq.; Niboyet, (1925) *REVUE DR. INT. PRIVÉ*, 161; Mestre and JAMES, *LA CLAUSE-OR EN DROIT FRANÇAIS* (1926) 91 et seq.; Rivière, (1932) *REVUE DR. INT. PRIVÉ* 1. The writer exposed the counterarguments in NUSSEBAUM, *op. cit. supra* note 35, at 17 et seq.

128. In the *Feist* case, however, the Court of Appeal advanced the opposite viewpoint. See (1933) *Ch. D.* 684, at 705 (Lord Lawrence) and 710 (Lord Romer).

the fact that the paper is inconvertible is a fact which is equally true as to parties outside the territorial limits within which a legal tender law is by its nature confined. Besides, it is not true that the invalidity of the gold clause is a part or a necessary consequence of the "*cours forcé*," that is to say, a necessary consequence of giving inconvertible paper money the status of legal tender.¹²⁹ The experience of the United States during the sixties and of England during contemporary times provides such striking counter evidence to such an assertion, that any theoretical reasoning on this score may be disregarded. Notwithstanding, I presume it is probable that the French courts will apply to the American statute the rule laid down by the Tribunal Civil de la Seine if the question should arise.¹³⁰ The Belgian and Egyptian jurisdictions are likely to do the same.¹³¹

The sharpest weapon against the abrogation of the gold clause would be retaliation. This is, in general, possible only by virtue of special laws allowing such retaliation. Thus the Austrian decree on the payment of foreign gold and silver debts, dated June 14, 1921,¹³² permits the debtor, when residing in Austria, to avail himself of foreign laws restricting gold clauses, provided that the creditor is residing or was residing, at the time the contract was made, in the state which restricted the clauses, or that the contract was made or must be performed in that state. Under this decree, the debtor can oppose the abrogation of the gold clause, for instance, against an American creditor, even if American law is not in question and the debt is governed by another law upholding the clause. As a matter of fact, such a case does not seem to have occurred up to the present. But in the case of the Austrian Federal Loan of 1930, mentioned above, the Vienna court dismissed the bondholders' claim on

129. In Germany the "*cours forcé*" of the banknotes was enacted by a law of Aug. 4, 1914; the abrogation of the gold clause, as indicated above, by decree of Sept. 28, 1914. The German mark was then still at par, see judgment of Oct. 13, 1933, 142 *Entscheidungen des Reichsgerichts in Zivilsachen* 70, 80.

130. In the case of *Travellers Bank v. Patenôtre*, Oct. 26, 1933, *Gazette du Palais*, 1933 II. 877 the defense of the Bank derived from the Joint Resolution was held not to be good for the reason that the case was not governed at all by American law.

131. The Supreme Court of Denmark says, in the judgment cited *supra* note 77, that in international relationships there is particular reason for upholding the gold clause, regardless of any restrictions being in force, for national considerations in the country in whose currency or in whose territory the debt is payable. The reasoning, however, does not rest upon the French theory, as the Danish court upholds domestic gold clauses too. Judgment of October 6, 1933, 7 *ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT* 962. In the case of the Copenhagen Telephone Co., not yet reported, the court of first instance admitted the application of the Joint Resolution.

132. See NUSSBAUM, *op. cit. supra* note 35, at 88.

the ground of the retaliatory decree of June 14, 1921.¹³³ In Hungary a similar provision has been adopted.¹³⁴

Limitations Imposed by Wording of the Joint Resolution

In delineating the sphere within which the Joint Resolution operates, we come finally to the question of how far the phrasing of the Resolution restricts its own applicability. Although foreign courts have shown themselves reluctant to vitiate either the American or other gold clause abrogation statutes by the use of the "ordre public" argument, they nevertheless seem to favor giving a restrictive construction to the Joint Resolution. Thus its non-application is achieved without attacking American law; nay, in ostensible conformity with it. Such argumentation obviously offers psychological and diplomatic advantages.¹³⁵

Restrictive interpretations have taken various forms. Some European writers have expressed doubts as to whether the Resolution concerns foreign debtors at all.¹³⁶ That these doubts are completely unfounded is proved by the law itself, which does not distinguish between foreign and domestic debtors at all, as well as by the intentions of Congress, made clear by the statement of Secretary of the Treasury Woodin and by Congressional hearings.¹³⁷ It has also been asserted that the Resolution does not apply to foreign creditors unless they reside in the United States; but in the *Copenhagen Telephone Company* case, the Copenhagen court rejected this contention as unsound.¹³⁸ Greater weight, however, must be accorded to the proposition that the law embraces only debts made primarily payable within the United States and does not govern debts made primarily payable outside the territory of the United States (as distinguished from debts made merely collectible in some foreign country). This construction was advanced particularly by the Hague court in the *Royal Dutch* and *Batavia* cases.¹³⁹ The court empha-

133. See note 63 and accompanying text.

134. Decree of February 10, 1923, par. 4. See NUSSEBAUM, *op. cit. supra* note 35, at 93. The recent Polish ordinance, cited *supra* note 79, operates somewhat as a retaliatory measure. Wolff, *Internationales Privatrecht*, in 15 *ENZYKLOPÄDIE DER RECHTS UND STAATSWISSENSCHAFT* 57, advances the opinion, that in the case of an American creditor and a German debtor, the contract being governed by German law, the debtor nevertheless could avail himself of the Joint Resolution, provided that the debt be payable in the United States. That would be a retaliation for which, in default of a pertinent governmental decree (see Art. 30 of the Introductory Law to the GERMAN CIVIL CODE), there is no basis in German law. See NUSSEBAUM, *op. cit. supra* note 62, at 78.

135. It may also involve better chances for recognition of foreign judgments by American courts; see *infra* note 148.

136. Thus WAHLE, *DIE RECHTSPRECHUNG* (1934) 85, reporting that the same view was advanced by the review, *DAS GELD*, March 4, 1934.

137. See notes 121, 122, *supra*.

138. Decision of first instance, not yet reported.

139. *Supra* note 104. To the same effect, see CORDES, *op. cit. supra* note 116, at 348.

sizes that the Joint Resolution, according to the preamble, rests upon the consideration that "dealing in gold affects the public interest," and that provisions for payment in gold "obstruct the power of the Congress to maintain at all times the equal power of every dollar." But that refers evidently, as explained before, to the literal performance of the gold *coin* clause—that is, to the corporeal conveyance of gold. Such conveyance, to be sure, is clearly forbidden only within the territory of the United States. But in the *Royal Dutch* and *Batavia* cases, gold *value* clauses were involved, as acknowledged by the court; and such a debt being payable in paper dollars, there is no reason why the arguments advanced by the court should prevent the application of the law to debts primarily payable outside the United States. The text of the Joint Resolution itself does not provide any such limitation. For example, there is no reason why a gold debt taken over by an American resident against another American resident in New York and secured by a New York mortgage, but for some special reason made payable primarily at Toronto should not be governed by American law. However, since American contracts made primarily payable in some foreign country are almost always made payable (as distinguished from merely collectible) in a foreign monetary unit, in which event the Joint Resolution is inapplicable,¹⁴⁰ this particular question will not be of much importance, unless, contrary to the views expressed in this article, the "Währungsstatut" (the law of the country in terms of the monetary unit of which the parties have contracted)¹⁴¹ is held to govern the contract.¹⁴²

If the debt is payable in New York in dollars but collectible elsewhere in local currency, the Joint Resolution should nevertheless be applicable. In the *Royal Dutch* case, however, the Hague court of first resort took the opposite view.¹⁰⁴ In that case, although American law was held to govern the bond issue in suit, and although the only place of *payment* expressly provided for in the bonds was New York, the bondholders were allowed to escape the application of the Joint Resolution because Amsterdam, which was specified in the bonds as a place of *collection*, had been selected by the bondholders as the place for encashment. But in

140. See page 83, *infra*.

141. See notes 73-78, *supra*, and accompanying text. If the "Währungsstatut" is held decisive, gold dollar contracts between non-Americans, who are almost certain to make the debt payable outside the United States, will be governed by the Joint Resolution unless it is interpreted as not applying to debts payable abroad.

142. Also unless the place of collection chosen for encashment is erroneously regarded as the place of payment and, under the place of payment theory, is considered as controlling. See notes 99-103, *supra*, and accompanying text. In such case, contracts entered into and made payable in some foreign country, but optionally collectible in the United States, would be governed by the Joint Resolution unless it were restrictively interpreted as not applying to debts payable abroad.

the *Batavia* case, in which the bonds did not mention any place of *collection*, the same court dismissed the suit on the ground of the Joint Resolution.¹⁰⁴ This Solomonic decision is legally and economically unsatisfactory. The fault lies with the court's failure to discriminate between place of payment and place of collection.¹⁴³

On the other hand, it follows from the text of the Joint Resolution that only debts payable in American dollars are governed by it. Thus if a contract governed in itself by American law provides for payment in Canadian gold dollars, the Joint Resolution can not apply. And although a payment in any gold coin within American territory would be legally impossible under the President's orders, the creditor would be entitled to receive in currency the full gold value of the amount contracted for.¹⁴⁴ These cases are likely to be so rare that the American legislature did not consider them. If it is kept in mind that the application of the Joint Resolution presupposes that the contract is governed by American law, there should be no apprehension of an excessively extended effect, in international cases, of the Joint Resolution.

Such questions of interpretation as do not bear upon territorial restrictions must be put aside in this article. Two of them, however, may be mentioned as connected in fact chiefly with international business. A Frenchman desired regular payments of about \$120,000 quarterly from America, and an American bank in 1932 guaranteed him, for a commission of \$15,000, a dollar rate of 25 francs, 32½ being the then gold par, for a two year period. After the Joint Resolution was passed, the bank declined to carry out the agreement, but was held liable by the Appellate Court of Paris.¹⁴⁵ The Court deemed American law not to be applicable. But even apart from that, the case did not come within the scope of the Joint Resolution. The bank's obligation did not "purport to give the obligee a right to require payment in gold or a particular kind of coin or currency *or in an amount in money of the United States measured thereby*"; the amount to be paid was measured by foreign money—a situation not covered by the Joint Resolution.

The application of the Joint Resolution, however, can not be excluded by any waiver declared in advance by the debtor; for the recognition of such a waiver would be incompatible with the spirit of the Joint Resolu-

143. See notes 99-103 *supra*, and accompanying text.

144. For the method of conversion into American dollars, in the case of an American judgment, see *Comstock v. Smith*, 20 Mich. 338 (1870).

145. *Travellers Bank v. Patenôte et Banque de France*, Oct. 26, 1933, *Gazette du Palais*, 1933 II. 877. The Joint Resolution is not expressly mentioned in the opinion, which refers to "restrictive measures taken, with regard to banking business, by the President of the United States." This seems to be an erroneous reference, but the problem discussed above was involved.

tion, which grants relief to debtors for reasons of public policy. This view must necessarily be adopted also by non-American courts provided American law is applicable. The question is internationally important, since many American gold dollar bonds issued by European debtors in postwar times contain provisos by which the debtor abandons all defenses resulting from any future emergency legislation affecting the creditor's rights. In drafting such clauses the parties were thinking of possible legislative measures proceeding from the *debtor's* country. Now that the creditors are faced with nullificatory measures taken at home, it is no doubt some consolation to them to reflect that a European court is less likely to refuse to recognize waivers of benefits conferred by American laws than waivers of benefits conferred by laws of their own country.¹⁴⁶

It is apparent from the discussion in the preceding sections that a foreign court might sustain the gold clause, although according to American ruling the Joint Resolution should apply. In that event the creditor might, on the strength of the judgment, seize any assets of the debtor situated within the state of jurisdiction. And the judgment might be given effect also in other countries, following the territorial laws providing for the recognition and execution of foreign judgments. Of course, if such recognition and execution were applied for before an *American* court, the claim surely would be dismissed; for even if the Court were not disposed to utilize the concept of public policy,¹⁴⁷ comity would not compel the recognition of the foreign judgment, at least where American nationals or residents were concerned.¹⁴⁸ But there is no doubt that courts of third states would give effect to the judgment provided the formal requirements therefor were fulfilled. The concept of "ordre public" of the state in which execution of the judgment is sought would not prevent the disregard by the courts of that state of an *American* statute, at least where American debtors are involved. Thus, the consequences of the judgment might become dangerous to a debtor not possessing considerable assets in the country where the original judgment is entered but having such

146. Waiver of the benefit of the Joint Resolution has been held valid by the Appellate Court of Cologne in the decision cited note 118, *supra*.

147. See GOODRICH, *HANDBOOK ON THE CONFLICT OF LAWS* (1927) § 203, p. 465.

148. See the famous definition of comity given by Justice Gray in *Hilton v. Guyot*, 159 U. S. 113, 164 (1895): "But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." See also, *Matter of James*, 248 N. Y. 1, 161 N. E. 201 (1928). Non-application caused by misinterpretation of the statute would probably not prevent recognition of the judgment. *Godard v. Gray*, L. R. 6 Q. B. 139 (1870); *MacDonald v. Grand Trunk Rr. Co.*, 71 N. H. 448, 52 Atl. 982 (1902); *RESTATEMENT, CONFLICT OF LAWS* (1932) §§ 445, 451.

assets within the third state. The danger, however, is lessened by the fact that the recognition of foreign judgments in most countries encounters generally the greatest difficulties, practically much greater than in the United States, except in the rare cases where special treaties exist.¹⁴⁹

Governmental Debts

Gold obligations of governments need special consideration. They are of two kinds. The first type, which embraces governmental bonds offered to public subscription and governmental debts resting on private contracts, are governed by common law, or, in Continental terminology, "private law." Here the state has not acted as sovereign.¹⁵⁰ The second group is composed of obligations created by acts of sovereignty, chiefly by treaties.

As regards the first group, the state stands on the same level as other debtors and must have the same benefit of laws granting debtors relief for reasons of emergency. Indeed, the financial condition of the state is generally not less affected by a national crisis than that of the common debtor. Of course, the statute restricting the gold clause may provide special regulations with respect to governmental debts, but in default of that, the general rule must apply to this group of obligations. The Joint Resolution expressly includes "every obligation of and to the United States, excepting currency." Thereby earlier contrary provisions are repealed. It has been argued that devaluation of the debts of the United States involves a particular derogation of the American Constitution, namely of Section Four of the Fourteenth Amendment ("The validity of the public debt of the United States, authorized by law . . . shall not be questioned.") This contention is advanced only by a single author.¹⁵¹ Again the writer would not like to enter too deeply into questions of American constitutional interpretation. But it may be said that the provision forms part of the financial regulation adopted following the Civil War and must be, apparently, considered in its connection with the whole of this regulation. It does not seem to proclaim a principal of legal philosophy, but to envisage a particular situation existing at the time of its enactment (1866).

To the second group of governmental obligations—those created by acts of sovereignty—belong the obligations taken over by the United States in the Treaty of 1903 with the Republic of Panama, giving the

149. For a short survey, see NUSSBAUM, *op. cit. supra* note 62, at 423 et seq.

150. See *Murray v. Charleston*, 96 U. S. 432, 445 (1877), and further decisions quoted by King, *supra* note 2, at 149.

151. Eder, *A Forgotten Section of The Fourteenth Amendment* (1933) 19 *Conn. L. Q.* 1.

United States the control of the Panama Canal Zone (Hay-Bunau-Varilla Treaty).¹⁵² Article XIV of the Treaty provides:

"As the price or compensation for the rights, powers and privileges granted in this convention by the Republic of Panama the Government of the United States agrees to pay to the Republic of Panama the sum of ten million dollars (\$10,000,000) in gold coin of the United States on the exchange of the ratification of this convention, and also an annual payment during the life of this convention, of two hundred fifty thousand dollars (\$250,000), in like gold coin, beginning nine years after the date aforesaid."¹⁵³

This contract rests exclusively on international law. It is not governed by the law of the United States. Therefore, in my opinion, the Joint Resolution cannot apply.¹⁵⁴ But the arguments of the Permanent Court in the *Serbian-Brazilian Loan* case¹⁵⁵ may justify a contrary decision. For if the validity or non-validity of the gold clause depends upon the law of the state in the monetary system of which the debt has been fixed, then American law, as the "dollar law," must apply, even if the treaty as a whole is governed by international law. Why we cannot follow the opinion of the Permanent Court is set forth above.¹⁵⁶

Public International Law

The validity or invalidity of the gold clause is in itself a matter of private law, and to the extent that international relationships are concerned, a matter of international private law. But public international law too has sometimes been encroached upon by national measures affecting the gold clause, by virtue of their extraordinary financial effects. This is shown, to a certain extent, by the case of the Serbian and Brazilian loans, where the controversy was submitted to the Permanent Court of International Justice. The Court considered itself competent to take cognizance of the case owing to the fact that the French government was

152. 33 STAT. 2234 (1903), 48 U. S. C. A. § 1301 (1926).

153. 33 STAT. 2238 (1903).

154. In the text of Art. XIV, after the term "dollars in gold coin of the United States," the customary words "of the present weight and fineness" are missing. That cannot mean the United States would be entitled to pay the annual sums in the new debased gold dollar as created by the President's proclamation of January 31, 1934. There is no doubt that by Art. XIV of the Treaty, the weight of the dollar as existing in 1903 was contemplated. As the United States was a party to the treaty, a closer definition may have been considered superfluous.

155. For a discussion of these arguments see notes 72, 73, *supra* and accompanying text.

156. See notes 74-78, *supra*, and accompanying text. The Panama case has at different times been discussed by the daily press. See, for instance, the N. Y. Times, March 3, 1934, at 7; N. Y. Herald-Tribune, March 2, 1934, at 14. Cf. Philippine case settled by American statute, P. L. No. 419, 23d Cong. (restoring to Philippines the original gold value of their deposits).

entitled to assert, and had claimed, the right to protect its nationals holding the said bonds, and that the other party was also a government.¹⁵⁷ In addition there was a special agreement between the interested governments for arbitration by the Permanent Court. Professor Verzijl, of the University of Utrecht, attempts to draw from this precedent far-reaching consequences for international law.¹⁵⁸ First he asserts that the abrogation of the gold clause, to the detriment of foreign nationals, "undoubtedly" constitutes the violation of an international obligation. But he furnishes no proof.¹⁵⁹ Even the Permanent Court, arguing in substance on the ground of international *private* law, is no authority for his contention. Professor Verzijl alleges furthermore that by virtue of the said violation jurisdiction of the Permanent Court could be invoked on the ground of the so-called "optional" arbitration clause,¹⁶⁰ even by a unilateral proceeding, insofar as governmental debts to private creditors are concerned. He rests his opinion on an extensive interpretation of the statute of the Permanent Court.¹⁶¹ But it is not necessary to analyze this interpretation, as the United States is not a member of the Permanent Court, nor has it concluded treaties compelling it to submit without further consent to any international court in a case like this.

The question of substantive international law remains. There are, indeed, two examples of international disputes, settled by reestablishment, in whole or in part, of the abrogated gold clause. One example is the controversy between Germany and Switzerland with regard to the German ordinance of September 28, 1914.¹⁶² As a number of Swiss banks and insurance companies, owning gold mortgages on German real estate, were, after the catastrophic depreciation of the mark, strongly affected by the consequences of the ordinance, the Swiss government protested against it, alleging that it was, with regard to foreign creditors, a breach of international law. The dispute was settled by the German-Swiss gold mortgage agreement ("Deutsch-Schweizerisches Goldhypothekenabkommen") of December 6 and 9, 1920,¹⁶³ completed by an additional agreement dated March 25, 1923.¹⁶⁴ Germany acknowledged the validity of the gold clause undertaken on behalf of Swiss creditors; and in return

157. COVENANT OF THE LEAGUE OF NATIONS, Art. XIV, 1 GENEVA SPECIAL STUDIES (1930).

158. Weekblad van Het Recht, No. 12654-6 (Oct. 1933).

159. The *German-Swiss* and the *Guatemala* cases (*infra*, notes 163-166) are unknown to him. Nor does he envisage the possibility that the abrogation may constitute an exceptional measure against foreign creditors or some groups of them. In such a case, violation of international public law may be existent.

160. FACHIRI, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE* (London 1932) 360.

161. Pertinent is Art. 36 of the statute. See FACHIRI, *op. cit. supra* note 160, at 271.

162. See note 37, *supra*.

163. REICHSGESETZBLATT (1920) 2023.

164. *id.* 1923 II. 284.

the latter granted a period of ten, and under certain contingencies, of fifteen years for payment, and a reduction of interest.

In another international controversy on the gold clause, the United States itself was a party. The President of Guatemala, in a decree dated December 22, 1903, abrogated the gold clause,¹⁶⁵ devaluating gold debts by this means to the extent of five-sixths.¹⁶⁶ Owing to steps promptly taken against this measure by the American and other governments, the President on September 14, 1904, repealed the decree.

It may be mentioned finally that different statutes enacted during the last few years to restrict gold clauses, have possibly provoked diplomatic overtures. No official communication has been issued, so far as is known, but bondholders have formed associations for the protection of their common interests¹⁶⁷ and it is said in the reports of these associations that several governments have in certain European cases backed the steps taken by them.

Under present conditions such efforts are not likely to be crowned with success. The considerations which have been advanced to justify the Joint Resolution and to overcome the difficulties presented by matters of constitutionality and "ordre public" in private law will protect the war and post-war restrictions of the gold clause in the field of public international law as well. The two examples given where diplomatic action resulted in reestablishment of the gold clause are not conclusive. In the Swiss-German affair there were special economic facts requiring Germany to comply with Swiss wishes. The Swiss banks and insurance companies had issued bonds and life insurance policies in Swiss francs and, to a very large extent, had invested the proceeds in German mortgages. These institutions were placed, by the abrogation of the gold clause securing their funds, in an extremely dangerous predicament. Political reasons and defaults in negotiations contributed to make the German government recognize, in principle, the full validity of the gold clauses. The treaty, however, was sharply criticized in Germany.¹⁶⁸ Predictions made at that time that it would prove impossible for German debtors to bear the additional burden thus cast upon them have been substantiated by later developments; indeed, the German govern-

165. See PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, 1904 (Wash. 1905), 346-351.

166. See the letter of Messrs. G. Amsinck & Co. to Mr. Hay, American Secretary of State, op. cit. *supra* note 165, at 348.

167. These associations are different from those discussed in Wynne and Borchard, *Foreign Bondholders Protective Organizations* (1934) 43 YALE L. J. 281.

168. I refer to Nussbaum, *Das Goldhypothekenabkommen mit der Schweiz* in (1921) RECHT UND WIRTSCHAFT 50 et seq. Particular data substantiating the reasoning of the Court are given there.

ment has with success refused to grant to other countries the same benefit granted to Switzerland. Therefore, the German-Swiss treaty of 1920 can scarcely be alleged to be a good precedent. As regards the Guatemala case, the fact that the President simply and plainly revoked his decree does not argue in favor of the economic necessity of his original measure. But be that as it may, the stress of the world economic crisis has far transformed legal notions from those of 1903 and even of 1920. The existence in law of a claim can no longer be considered as sufficient reason for upholding it. It seems, to a certain extent, unavoidable to weigh legal rights in the balance of economic and social justification. There is more at stake than the gold clause. Maintenance of it is not the last word of legal wisdom.